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Federal Communications Commission
Office of the Secretary

Ms. Marlene H. Dortch
Secretary, Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***Ex Parte Presentation in 01-92, 99-68***

Dear Ms. Dortch:

This *ex parte* letter is submitted on behalf of Hypercube Telecom, LLC ("Hypercube") to express concern regarding the process by which the Federal Communications Commission (the "Commission") is considering comprehensive intercarrier compensation reform and the substantive impacts that a lack of proper process could have on Hypercube and other competitors in the industry going forward.

The Administrative Procedure Act "requires an agency to 'publish' notice of 'either the terms or substance of the proposed rule or a description of the subjects and issues involved,' in order to 'give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments . . . .'"[1] Further, it is well-settled that "[n]otice is sufficient 'if it affords interested parties a reasonable opportunity to participate in the rulemaking process,' and if the parties have not been 'deprived of the opportunity to present relevant information by lack of notice that the issue was there.'"[2] The notice-and-comment process required by the Administrative Procedure Act:

> does not simply erect arbitrary hoops through which federal agencies must jump without reason. Rather, the notice requirement "improves the quality of agency rulemaking" by exposing regulations "to diverse public comment," ensures "fairness to affected parties," and provides a well-developed record that "enhances the quality of judicial review."[3]

Consistent with these requirements, the Commission issued a Notice of Proposed Rulemaking ("NPRM") in 2001 to consider how to implement comprehensive intercarrier

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[1] *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008) (quoting 5 U.S.C. § 553).

[2] *WJG Tel.Co., Inc. v. FCC*, 675 F.2d 386, 389 (D.C.Cir. 1982) (citations omitted).

[3] *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C.Cir.1983) (citations omitted)).

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compensation reform.[4] In that NPRM, the Commission sought comment on the merits of a bill-and-keep compensation system and also about how the Commission might otherwise revise the calling-party-network-pays regime.[5] The Commission issued a Further NPRM in 2005, noting that several industry groups had put forward comprehensive proposals for reform (and implicitly recognizing that proper administrative procedure called for publication of and further comment on the far-reaching effects of those specific proposals).[6] In 2006 and 2008, the Commission took this same step twice again, inviting industry comment on the comprehensive Missoula Plan and then the plan put forward by AT&T to adjust various subscriber line charge and other revenue and cost recovery mechanisms as part of intercarrier compensation reform.[7]

Thus, the Commission has been quite careful to proceed in accordance with these requirements of administrative procedure in the past, seeking comment on each significant proposal at each step along the way. It is therefore unclear why the Commission would depart now from its deliberate and careful path toward intercarrier compensation reform by rushing through substantial changes without adequate opportunity for public consideration and comment. Admittedly, the process of reform has been a long and difficult one, with the 2001 NPRM in fact representing only one step in a much longer evolution of intercarrier compensation. But the length of time it has taken to get to this point does not justify such a sudden "end" on the basis of proposals that few, if any, have seen. Rather than providing a single proposal (or defined set of proposals) for all parties to consider and comment upon, the past few months have largely been consumed by parties "shooting at moving targets," as first AT&T[8] and then

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[4] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610 (2001).

[5] *See id.* at 9612-13 and 9645-9653, ¶¶ 4 and 98-120.

[6] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4687 (2005), at ¶ 4 ("Since the Commission adopted the *Intercarrier Compensation NPRM* acknowledging the need for reform, several industry groups have developed proposals for comprehensive reform of existing intercarrier compensation regimes and submitted those proposals to the Commission. In this *Further [NPRM]*, we solicit comment on these proposals, including the legal and economic bases for these proposals, as well as the end-user effects and universal service issues implicated by them. We also ask parties to comment on whether and how these reform proposals would affect network interconnection and seek comment on the implementation issues associated with any reform measures.")

[7] *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, Public Notice, DA 06-1510 (July 25, 2006); *Petition of AT&T for Interim Declaratory Ruling and Limited Waivers*, WC Docket 08-152, Public Notice, DA 08-1725 (July 24, 2008).

[8] Letter from Robert W. Quinn, Jr., AT&T Services, Inc., to Chairman Martin, CC Dockets Nos. 01-92, 99-68, and 96-45, WC Dockets Nos. 05-337 and 07-135, dated July 17, 2008.

Verizon[9] have either put forward or have revised or "clarified" various proposals for the Commission to achieve intercarrier compensation reform. In turn, hundreds of comments have been filed by other stakeholders responding to those proposals and suggesting *yet other* alternatives for reform (to which AT&T and Verizon have in turn responded).

Despite all of these filings, there is still a real concern as to whether there has been a *reasonable* opportunity to participate -- in particular, whether there has been adequate notice of what rules might be adopted and sufficient opportunity for parties to present meaningful comment on those proposals. Instead, parties have taken aim at one another, with each trying to read the "tea leaves," media reports, and industry rumors as to what intercarrier compensation reforms might be in the Commission's circulating order(s) and what particular proposal from the day or week before may have now struck a chord.

Indeed, notwithstanding the multitude of filings in recent days, there are several areas in which the record is lacking detail and does not support immediate action by the Commission. On these issues in particular, the Commission should avoid taking any final action prior to proposing rules or tentative conclusions and seeking further comment:

- *Interconnection:* Just over one month ago, Verizon proposed what appears to be a paradigm-shifting change to the Commission's interconnection rules. Departing from the Commission's long-standing default rule that competitors can establish one point of interconnection per LATA, Verizon proposes that a terminating carrier may itself demand multiple points of interconnection in each LATA, with the baseline being the serving incumbent LEC's historical tandem switch deployment.[10] Although Verizon has since clarified that it does not believe the proposed interconnection structure overrides Sections 251 and 252,[11] it would appear in practice to have a significant impact on the current interconnection rights and obligations of carriers under the statute. Moreover, it is not clear how Verizon's interconnection proposal would apply or need to be modified if *some other* intercarrier compensation mechanism/rate (*i.e.*, other than Verizon's $0.0007 for transport and termination of all traffic) were adopted. Finally, Verizon's interconnection proposal drives costs to competitive carriers that cannot be recovered through a regime that places a cap on termination rates.

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[9] Letter from Susanne A. Guyer, Verizon, to Chairman Martin, *et al.*, CC Dockets Nos. 01-92 and 96-45, dated Sept. 12, 2008 ("Verizon Plan").

[10] Verizon Plan at 2.

[11] *See Ex Parte Presentation* of Verizon, CC Docket No. 01-92, WC Docket No. 04-36, dated Oct. 3, 2008, at 1.

- *Transit:* Although most of the focus in this proceeding has been on how much transport and termination rates should be reduced, Verizon appears to suggest that, in the absence of express contractual prohibitions to the contrary, it should be permitted to charge current access rates in providing transit services.[12] A few commenters have addressed and objected to this proposal in limited fashion,[13] but the record is hardly developed enough to justify any action on Verizon's proposal or the passing comments of a few other stakeholders. Indeed, although it proposes (without support) this "cap" for transit service rates, Verizon has acknowledged that the Commission should issue a Further NPRM to consider modifications to tandem transit service rates.[14]

- *Phantom Traffic:* Although the Commission has considered this question for some time, some of the recent proposals take "left turns" that raise significant concerns and warrant more careful evaluation through a notice-and-comment publication. In particular, transit providers should not be put in the position of policing and "solving" concerns over so-called "phantom traffic" for the rest of the industry. Industry standards are in place for carriers to adopt a single-bill multiple-tariff arrangement. The Commission should not upset those standards and arrangements now by requiring transiting carriers to bill terminating access for subtending carriers at no charge and to bear the risk of collection failures. It certainly makes sense for the Commission to reinforce that carriers are compelled by law to transmit telephone numbers from the calling party and as received from other providers. And there are sufficient technological remedies available today, which if adopted by *all* carriers, would further help to resolve this issue. The Commission should therefore drive carriers toward adoption of these remedies and either establish a new task force or work with existing industry organizations (such as ATIS) to implement these measures. But if the Commission desires to go beyond this, to pursue drastic departures from current industry arrangements, and to subject transit providers to substantial new financial liability to solve a problem that is not of their making, the Commission should spell out precisely what it plans to do, explain how and why those modifications are necessary and appropriate, and allow parties to comment on that. Such an approach would be far better

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[12] Verizon Plan at 4.

[13] *See, e.g., Ex Parte* Presentation of tw telecom inc. and One Communications Corp., CC Dockets Nos. 96-45, 99-68, and 0-92, WC Dockets Nos. 04-36 and 05-337, dated Oct. 1, 2008, at 2.

[14] Verizon Plan at 4.

informed than the current tack, which yet again has parties taking aim at the latest proposals and modifications from one another and guessing what the Commission might be thinking. At bottom, this has been improperly characterized as an issue of compensation reform, when in fact it is an issue that could be resolved through proper implementation of industry standards and adoption of technologies that are currently available to *all* carriers. The Commission should therefore publish and seek comment upon proposals to resolve the "phantom traffic" issue in such a manner.

- *Rates for Transport and Termination:* Verizon has argued for a single rate of $0.0007 per minute -- which appears to have been derived from negotiated agreements settling ISP-bound traffic disputes -- for the transport and termination of all telecommunications (subject to adoption of its preferred interconnection rules).[15] Other carriers have submitted substantial cost evidence showing that this rate is confiscatory and does not begin to cover the costs of transport and termination in many cases.[16] As a new entrant that hardly possesses the scale of an AT&T or Verizon, Hypercube concurs with the concerns raised by the latter group, and believes that the Commission would be well-served by giving all parties the time to digest and provide meaningful comment on the studies and other data filed in this proceeding.

- *Pricing Methodology:* Although the specific proposal(s) currently under consideration by the Commission have not been disclosed to the public, press reports and industry rumors indicate that the Commission may be considering a change in the methodology by which rates for transport and termination are established. (Certainly, any "methodology" that mandates or drives toward the specific result of a $0.0007 per minute rate for transport and termination would be a departure from the current TELRIC methodology.) In the past, when considering any shift in pricing methodology, the Commission has published and sought comment on the proposed changes.[17] Consistent again with the

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[15] Verizon Plan at 4.

[16] *See, e.g., Ex Parte* Comments of PAETEC, CC Docket No. 01-92 and WC Docket No. 04-36, dated Oct. 17, 2008; *Ex Parte* Comments of NuVox, CC Docket No. 01-92 and WC Docket No. 04-36, dated Oct. 2, 2008.

[17] *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610, 9645-9646 (2001), at ¶¶ 99-101; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4716-4719 (2005), at ¶¶ 64-73; *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, Public Notice, DA 06-1510 (July 25, 2006); *Petition of AT&T for Interim Declaratory Ruling and Limited Waivers*, WC Docket 08-152, Public Notice, DA 08-1725 (July 24, 2008).

requirements of administrative procedure, the Commission should issue a NPRM spelling out how it proposes to change the methodology and allow for informed consideration and comment upon those changes.

- *Originating Access:* Again, nearly all of the focus in this docket has been on unifying *terminating* intercarrier compensation rates. AT&T's plan earlier this summer, however, proposed that the Commission, on an interim basis, allow it to *increase* its interstate originating access charges to replace revenue lost on the terminating access side.[18] Verizon then included a brief comment in its plan that the Commission cap interstate *and* intrastate originating access charges at current rates (or maintain existing price caps) pending a Further NPRM.[19] These suggestions by AT&T and Verizon, however, come across as afterthoughts in the larger scope of the proposals presented, and they lack any justification or legal support; as a result, there has been little discussion of these issues in the record. Moreover, from a legal perspective, it is unclear how the Commission could set a unified originating access rate. Even if one reads Section 252(d)(2) as permitting the Commission to promulgate a methodology by which state commissions could set a unified rate,[20] this provision applies *only to transport and termination.* Nothing in that provision addresses *originating access*, and it therefore provides no legal basis for the Commission to take any action whatsoever with respect to originating access, including but not limited to compelling the state commissions to set unified intrastate and interstate rates with respect to such access service. Thus, prior to any reform of originating access charges, the Commission needs to seek comment on the legal, policy, and economic bases therefore.

To address the potential procedural deficiencies with racing toward reform and resolution of these and other issues, and to avoid the substantive harm and unintended consequences that could follow for Hypercube and other stakeholders from incomplete consideration of such issues, Hypercube joins the chorus of others who advocate that the Commission issue a Further NPRM setting forth the Commission's final comprehensive intercarrier compensation reform proposals.[21] The Commission need not view such a

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[18] Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers, WC Docket No. 08-152, filed July 17, 2008, at 9-10.

[19] Verizon Plan at 5.

[20] *See, e.g., Ex Parte* Presentation of EarthLink, Inc., *et al.*, CC Dockets Nos. 99-68 and 01-92, dated Oct. 20, 2008 ("EarthLink *Ex Parte*"), at 19-20.

[21] *See, e.g.,* EarthLink *Ex Parte* at 19-20; Motion/Request of the National Association of Regulatory Utility Commissioners for Public Comment on Recently Circulated

step as putting off reform for years longer, and there is no reason it could not adopt a final order within a few months following receipt of reply comments to a Further NPRM. But the Commission should not risk challenge on the basis of both administrative procedure *and* substantive legal concerns in order to achieve reform a few months earlier than it might otherwise.

Finally, in addition to the perils of undertaking comprehensive intercarrier compensation reform without proper procedural grounding, the Commission should proceed carefully in implementing various aspects of "piecemeal" reform as advocated by certain parties in these proceedings. For example, some have argued that the Commission should target "revenue sharing" as part of an effort to address traffic stimulation concerns. But revenue sharing is neither unlawful nor a reliable indicator of traffic stimulation. Offering incentives to customers (which often could be construed as "revenue sharing") is a necessary and common business practice, and yet the term "revenue sharing" has been broadly bandied about in a way that could likely sweep up arrangements that have little or nothing to do with traffic stimulation concerns. Likewise, using a "net payor" test to establish revenue sharing is imprecise and would favor those larger operations who are able to spread revenues among jointly owned affiliates. The Commission should therefore avoid an overly heavy hand in addressing traffic stimulation, and should steer clear of sweeping pronouncements and imprecise conclusions about "revenue sharing" that would harm smaller carriers and the legitimate business arrangements they have with customers.

"Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking" on Universal Service and Intercarrier Compensation Reform, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 21, 2008; *see also Motion to Defer and Set for Public Comment,* Independent Telephone & Telecommunications Alliance, CC Dockets Nos. 96-45 and 01-92, WC Dockets Nos. 04-36, 05-337, and 06-122, dated Oct. 24, 2008. These requests for transparency and consistency with sound administrative procedure have attracted far-flung support from individual state regulators and nearly every corner of the industry other than the Bell companies themselves. For example, yesterday, Hypercube joined numerous organizations (ranging from NARUC and NASUCA to CompTel and ITAA) and approximately 30 companies (ranging from competitive local carriers to rural telephone cooperatives) in a press release calling for publication of rules for comment; *see Ex Parte Presentation* of of Broadview, Cavalier and XO, CC Docket 01-092, date October 27, 2008. *See also Ex Parte* Presentation of the Tennessee Regulatory Authority, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 24, 2008; *Ex Parte* Presentation of the South Carolina Public Service Commission, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 24, 2008; *Ex Parte* Presentation of the North Carolina Utilities Commission, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 24, 2008; *Ex Parte* Presentation of the New Mexico Regulation Commission, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 24, 2008; *Ex Parte* Presentation of the Massachusetts Department of Telecommunications and Cable, CC Dockets Nos. 96-45 and 01-92, WC Docket No. 06-122, dated Oct. 24, 2008; *Ex Parte* Presentation of the Georgia Public Service Commission, CC Dockets Nos. 80-286 and 01-92, WC Dockets Nos. 04-36, 06-122, and 08-152, WT Docket No. 05-194, dated Oct. 23, 2008.

Respectfully submitted,

/s/
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